

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	File No. EB-02-AT-379
	)	NAL/Acct. No. 200332480012
Fun Media Group, Inc.	)	FRN No. 0007-3298-65
Owner of Antenna Structure #1043249 in	)	
Scant City, Alabama	)	
Arab, Alabama	)	

**MEMORANDUM OPINION AND ORDER**

**Adopted: October 6, 2005****Released: October 11, 2005**

By the Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order* (“MO&O”) we deny a Petition for Reconsideration (“Petition”) filed on July 8, 2004, by Fun Media Group (“FMG”), licensee of Station WAFN(FM), Arab, Alabama, and owner of antenna structure number 1043249, Scant City, Alabama. FMG seeks reconsideration of a June 8, 2004 *Forfeiture Order* (“Order”),<sup>1</sup> in which the Enforcement Bureau issued a monetary forfeiture in the amount of eight thousand dollars (\$8,000) for willful violation of Section 17.50 of the Commission’s Rules (“Rules”).<sup>2</sup> The noted violation involves FMG’s failure to clean and repaint its antenna structure to maintain good visibility. For the reasons discussed below, we affirm the monetary forfeiture of \$8,000.

**II. BACKGROUND**

2. On October 30, 2002, a Commission agent (“agent”) from the Atlanta, Georgia Field Office (“Field Office”) inspected the referenced antenna structure (or “tower”) owned by FMG. The Commission’s antenna structure registration database indicates that the structure is required to be painted. At the time of the inspection, the agent observed that the tower’s aviation orange and white paint was faded and chipped, reducing the visibility of the structure.

3. On December 6, 2002, the Atlanta Office proposed a \$10,000 forfeiture in a *Notice of Apparent Liability for Forfeiture* (“NAL”) for the antenna structure violation. On January 13, 2003, FMG submitted a response to the NAL (“Response”).<sup>3</sup> In its Response, FMG disputed the findings of the Atlanta Office regarding the condition of the antenna structure, and requested a cancellation of the forfeiture based on its assertion that the circumstances surrounding the inspection did not support the violation cited in the NAL. In denying FMG’s request, the *Order* noted that the forfeiture was reduced to \$8,000 because FMG has no prior record of violation with the Commission. FMG petitioned for reconsideration stating that the *Order* failed to properly address FMG’s arguments concerning the

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<sup>1</sup> Fun Media Group, Inc., 19 FCC Rcd 10230 (Enf. Bur. 2004).

<sup>2</sup> 47 C.F.R. § 17.50.

<sup>3</sup> FMG supplemented its Response on July 8, 2004 with tax returns from 2002 and 2003.

conditions of the tower, the agent's distance from the structure and other important facts which, in FMG's view, undermine the validity of the *NAL*.

4. Section 503(b) of the Communications Act of 1934,<sup>4</sup> as amended ("Act"), Section 1.80 of the Rules,<sup>5</sup> and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*<sup>6</sup> ("Forfeiture Guidelines") set forth the Commission's standards for review of a petition for reconsideration of the imposition of a forfeiture for a rule violation. Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.<sup>7</sup>

### III. DISCUSSION

#### A. Licensee's Arguments

##### Background

5. Section 17.50 of the Rules states that antenna structures requiring painting must be cleaned or repainted as often as necessary to maintain good visibility. The Commission has consistently held that there is a significant public safety concern with regard to antenna structures. Thus, the Commission enforces antenna structure registration requirements and painting requirements to maintain the tower's visibility to aircraft.<sup>8</sup>

##### Discussion

6. FMG alleges that the *Order* failed to provide an analysis of the factors proffered by FMG challenging the agent's ability to observe the condition of the tower. FMG argues that the effects of distance from which the agent observed the tower and weather prevented the agent from being able to determine correctly the tower's condition on October 30, 2002. FMG further asserts that because October 30, 2002 was an overcast day, the tower would appear dark and also submits a weather report ("report") showing 1 ¼ inches of precipitation on October 30, 2002.

7. We disagree. The *Order* addressed all factors, concluding that the tower observation by the agent met established procedure, and that the agent's observations and experience allowed him to determine the tower's condition. We find nothing in FMG's Petition to warrant overturning the agent's determination.<sup>9</sup> This conclusion is buttressed by the facts that the agent observed the tower from an

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<sup>4</sup> 47 U.S.C. § 503.

<sup>5</sup> 47 U.S.C. § 1.80.

<sup>6</sup> 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

<sup>7</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>8</sup> *SpectraSite Communications, Inc.*, 17 FCC Rcd 7884, 7888 (2002); *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21871 (2002); *Cumulus Licensing Corp.*, 19 FCC Rcd 24,815 (Enf. Bur. 2004); *Exosphere Broadcasting, LLC*, 19 FCC Rcd 23,554 (Enf. Bur. 2004); *North Country Repeater*, 19 FCC Rcd 22,139 (Enf. Bur. 2004).

<sup>9</sup> *See William L. Needham and Lucille Needham*, 18 FCC Rcd 5521 (Enf. Bur. 2002) (upholding the field agent's determination that the tower's painted bands were not clearly visible, despite tower owner's assertion that it had no difficulty discerning the painted bands and maintained a painting schedule for the tower).

approved distance and with the benefit of binoculars as noted in FMG's Petition.<sup>10</sup> That October 30, 2002, was an overcast and rainy day does not undermine the validity of the agent's observations, which reflect a thorough and proper analysis of the tower's condition.

8. FMG also contends that a series of statements by "independent third parties" have sufficient weight to overrule the agent's observations. Again, we disagree. As noted in the *Order* neither the statement of John Hain nor Robert Murphy specifically addresses the condition of the tower on October 30, 2002. These statements do not belie the validity of the agent's observations and determination that the antenna structure was not in compliance with § 17.50. Hain's statement, dated January 10, 2003, contends that the tower was properly painted sometime within the period from July 10, 2002 and January 10, 2003, but provides no specificity as to whether the antenna was painted on October 30, 2002. Murphy's statement reflects his observations during a flight on September 29, 2002, more than a month prior to the agent's observation. He states that he has never had a problem seeing the towers, and then further states they are depicted on the Atlanta Sectional. Murphy's observation as to the tower's condition appears to be based on his overall familiarity with the tower rather than the particular condition of the tower on a date proximate to October 30, 2002. Our rejection of his conclusion is further premised on the fact that he viewed the tower from a distance of 1 1/2 miles. In sum, we find that neither statement reflects the condition of the tower on October 30, 2002, and thus reject them and the argument that they overrule the agent's observations. Further, as a factual matter, FMG states that the tower was painted "in December 23, 2002" almost two months after the agent's observations.

9. FMG further argues that the fact the National Weather System ("NWS") used the tower for its operation established the fact the tower was in good condition. The acceptance by the NWS of FMG's tower for use in its operation does not establish that the NWS considered anything other than the tower's location. We note that FMG has not provided any evidence that the National Weather Service considered the paint condition of the tower in selecting the tower. Thus, we reject this argument.

10. In its petition, FMG next argues that the photographic evidence it submitted was not addressed. After review of the record, we agree with FMG and will address the photographic evidence FMG provided herein.<sup>11</sup> FMG submitted in its January 13, 2003 response to the *NAL*, a series of pictures of its tower taken from ¼ mile on December 9, 2002. In these photographs, the tower appears faded and dark. The photographs taken by FMG cannot overcome the observations of the agent made on October 30, 2002, from as close as 100 feet with the benefit of using binoculars. We thus find that the photographic evidence submitted by FMG does not undermine the agent's determination or warrant reversal. We further find that *Midwest*,<sup>12</sup> cited by FMG, is inapposite as the pictorial record in *Midwest* was conclusive in establishing that the agent's conclusion was erroneous.

B. Inability to pay

Background

11. In the *Order*, we considered Petitioner's arguments, supporting material and cases cited and concluded that the FMG has not given sufficient justification to warrant the requested reduction.

<sup>10</sup> FMG's Petition acknowledges and discounts, without explanation, the effect the agent's use of binoculars had on his ability to observe the tower's condition., even at a distance effectively less than 100 feet. Petition, ¶ 5.

<sup>11</sup> The Commission has determined that consideration of a previously unconsidered pleading within a reconsideration proceeding is appropriate where all the allegations are fully reviewed and addressed prior to a determination in the reconsideration. See *California Metro Mobile Communications*, 17 FCC Rcd 22974 (2002); *Eagle Radio, Inc.*, 12 FCC Rcd 5105 ¶2 (1997).

<sup>12</sup> *Midwest Towers Partners, LLC*, 18 FCC Rcd 12921 (Enf. Bur. 2003).

### Discussion

12. In its Petition, FMG again raises the issue of inability to pay, but adds nothing to its previously rejected showing that would permit us to approve its request. In analyzing economic hardship claims, as the *Order* explains,<sup>13</sup> the Commission generally looks to companies' gross revenues as reasonable and appropriate yardsticks to determine their ability to pay assessed forfeitures.<sup>14</sup> Indeed, the Commission stated that if companies' gross revenues are sufficiently large, the fact that net losses are reported, alone, does not necessarily establish inability to pay.<sup>15</sup> We find that FMG's tax returns for 1999, 2000, 2001, 2002 and 2003 reflect sufficiently large gross revenues and that FMG's gross revenues effectively negate the financial hardship claim.<sup>16</sup> FMG seeks to distinguish the holding in *PJB Communications* ("*PJB*")<sup>17</sup> that gross revenues, not losses are the standard for determining an inability to pay claim. FMG's argument is predicated upon the Commission's recognition of an exception to the holding in *PJB*, that in limited circumstances, losses may be considered sufficient to justify an inability to pay claim. By referencing salaries and debt payments in its returns, FMG claims that it meets the exception.<sup>18</sup> FMG does not explain how its described circumstances bring it within the noted exception. We further find that FMG has not substantiated its claim that payment of the \$8,000 claim would adversely affect its service to the public.<sup>19</sup> Finally, the cases FMG seeks to distinguish<sup>20</sup> are not on point, as each case is cited only for the forfeiture's percentage of that licensee's gross revenue and the fact that the forfeiture percentage was found reasonable. The instant forfeiture assessment and the percentage of gross revenues it represents falls within the range that has been found acceptable.<sup>21</sup> Accordingly, we reject FMG's claim of inability to pay.

### C. Conclusion

13. We have examined FMG's Petition pursuant to the statutory factors above and in conjunction with the *Policy Statement*. As a result of our review, we affirm the *Order's* conclusion that FMG willfully violated Section 17.50 of the Rules and that no reduction is warranted for inability to pay.

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<sup>13</sup> 12 FCC Rcd 17087, 17093 ¶ 9, recon. denied, 15 FCC Rcd 303 (1999) ("Forfeiture Policy Statement").

<sup>14</sup> *Id.* at 17113.

<sup>15</sup> See, e.g., *Alpha Ambulance, Inc.*, 19 FCC Rcd 2547 (2004); *Local Long Distance, Inc.*, 15 FCC Rcd 24385 (2000), recon. denied, 16 FCC Rcd 10023, 10025, ¶ 6, (2001); *Independent Communications, Inc.*, 14 FCC Rcd 9605 (1999), recon. denied, 15 FCC Rcd 16060, 16060 ¶ 2 (2000); *Hoosier Broadcasting Corp.*, 14 FCC Rcd 3356 (CIB 1999), recon. denied, 15 FCC Rcd 8640, 8641 ¶ 7 (Enf. Bur. 2000).

<sup>16</sup> *Id.*

<sup>17</sup> *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992).

<sup>18</sup> *Id.*

<sup>19</sup> Petition for Reconsideration, para.13.

<sup>20</sup> *Hoosier Broadcasting Corp.*, 15 FCC Rcd 8640, 8641 (2003) and *Afton Comm. Corp.* 7 FCC Rcd 6741, 6741 (1992).

<sup>21</sup> See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088, 2089 (1992) (Forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues). See also, *Hoosier Broadcasting Corporation*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (Forfeiture not deemed excessive where it represented approximately 7.6 of the violator's gross revenues); *Afton Communications Corp.*, 7 FCC Rcd 6741, 6742 (Comm. Carrier Bur. 1992) (Forfeiture not deemed excessive where it represented approximately 3.9 percent of violator's gross revenues).

#### IV. ORDERING CLAUSES

14. Accordingly, **IT IS ORDERED THAT**, pursuant to Section 405<sup>22</sup> of the Act and Section 1.106 of the Rules,<sup>23</sup> FMG's July 8, 2004 Petition for Reconsideration of the Enforcement Bureau's Forfeiture Order issued on June 8, 2004 **IS DENIED**.

15. **IT IS ALSO ORDERED THAT**, pursuant to Section 503(b) of the Act and Sections 0.111, 0.311 and 1.80(f)(4) of the Rules,<sup>24</sup> Fun Media Group **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of eight thousand dollars (\$8,000) for willfully violating Section 17.50 of the Rules.

16. Payment of the forfeiture shall be made in the manner provided in Section 1.80 of the Rules within 30 days of the release of the *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>25</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106.

17. **IT IS FURTHER ORDERED** that, a copy of this *Order* shall be sent by Certified Mail Return Receipt Requested and by First Class Mail to Fun Media Group, Inc., 981 Brindlee Mountain Parkway, Arab, AL 35016 and to its counsel, M. Scott Johnson, Gardner, Carton & Douglas, 1301 K Street, N.W. Suite 900 East Tower, Washington, D.C. 20005.

#### FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith  
Chief, Enforcement Bureau

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<sup>22</sup> 47 U.S.C. § 405.

<sup>23</sup> 47 C.F.R. § 1.106.

<sup>24</sup> 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

<sup>25</sup> See 47 U.S.C. § 504(a).